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Nos. 01-593 & 01-594

IN THE

Supreme Court of the United States

DOLE FOOD COMPANY, *et al.*,
Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*
Respondents,

DEAD SEA BROMINE CO., LTD., *et al.*,
Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICI CURIAE* OF THE REPUBLIC OF IRELAND AND ICAROM PLC (UNDER ADMINISTRATION) IN SUPPORT OF PETITIONERS

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BRIEF *AMICI CURIAE* OF THE REPUBLIC OF IRELAND AND ICAROM PLC (UNDER ADMINISTRATION) IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE* [1]

In 1985, the Republic of Ireland acquired what was then a privately-held insurer known as The Insurance Corporation of

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[1] Counsel for the parties in these actions have consented to the filing of this brief, and those consents have been filed with the Clerk of this Court. No counsel for either party had any role in authoring this brief, and no person other than the named *amici* and their counsel made any monetary contribution to the preparation and submission of this brief.

Ireland plc ("ICI"). At the time of the acquisition, ICI, one of Ireland's largest insurers, was insolvent, and the Irish government feared that its failure would also lead to the collapse of ICI's then parent, Allied Irish Banks ("AIB"), one of Ireland's premier banks. The government's intervention to acquire ICI and relieve AIB of the financial burden that ICI represented was calculated to avert severe damage to the Irish insurance and banking systems and, ultimately, to the stability of the Irish economy. This brief is filed on behalf of *amici curiae* the Republic of Ireland and its wholly-owned instrumentality Icarom plc (Under Administration) ("Icarom"), which ICI was renamed in 1990. Icarom now operates solely in run off.

The interests of the Republic of Ireland and Icarom stem from the latter's involvement in insurance coverage litigation in the United States. From the early 1970's until 1990, in addition to writing domestic insurance in Ireland, ICI was an active participant in the London insurance market and subscribed to a number of insurance policies for North American insureds. As such, ICI (and Icarom as its successor) is a frequent defendant in coverage actions brought by those insureds in American courts. In a number of instances where an action has been filed in state court, ICI/Icarom has removed the case to federal court pursuant to the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1602, *et seq.*, on the basis of the Republic of Ireland's ownership.

As discussed more fully below, the Republic of Ireland chose to structure its ownership of ICI/Icarom through a holding company. Thus, the issue of whether ICI/Icarom qualifies as an "agency or instrumentality" under the FSIA arises frequently in these coverage actions. Recently, Icarom was denied access to federal court in two actions that arose within the Ninth Circuit's jurisdiction on the basis of that circuit's bright-line rule against jurisdiction for tiered entities.

EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co., 257 F.3d 992 (9th Cir. 2001); *Browning-Ferris Indus., Inc. v. Lexington Ins. Co.*, No. 02-643, slip op. (D. Ariz. June 12, 2002). On the same facts, however, courts in other circuits have determined that the Republic of Ireland's ownership does qualify Icarom as the government's instrumentality and entitles Icarom to federal jurisdiction. The latest decision to so rule is *Fortis Insurance Ltd. v. Browning-Ferris Industries, Inc.*, No. H-02-1226, slip op. (S.D. Tex. June 26, 2002).[2]

The Republic of Ireland and Icarom have an interest in this Court's resolution of the question of whether tiered ownership is permissible under the FSIA, since it may directly affect currently pending cases in which Icarom is a party. In addition, it may affect Icarom's future ability to remove cases to federal court. Accordingly, the Republic of Ireland and Icarom file this brief to put before the Court their factual circumstances and to urge the Court, for reasons in addition to those set forth in the Petitioners' briefs, to construe the FSIA in a manner that permits tiered ownership.

SUMMARY OF ARGUMENT

There is a wide range of circumstances that can lead a foreign government to use a tiered ownership structure for entities in which it has a vital proprietary interest. A combination of Irish legal requirements and emergency economic conditions led the Republic of Ireland to use a shell corporation to act as its nominee in holding legal title to ICI. This structure cannot obscure, however, that the Irish government has 100% of the beneficial ownership of that company.

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[2] The district court's opinion is not yet published. A copy is contained in the Lodging Material of *Amici Curiae* the Republic of Ireland and Icarom plc (Under Administration) In Support of Petitioners.

Under the FSIA's plain language, a foreign sovereign's "agency or instrumentality" qualifies for the statute's procedural protections whether it is owned directly by the sovereign or indirectly through another of the sovereign's agencies or instrumentalities. This interpretation follows from (i) the statute's express definition of the term "foreign state" as including its "agency or instrumentality," and (ii) the use of the undefined terms "owned" and "ownership interest" to extend the statute's reach to a broad array of proprietary interests, legal and beneficial, direct and indirect.

The statute's underlying purpose is to protect the foreign relations interests of the United States by providing more uniform treatment in resolving disputes in which foreign sovereigns have proprietary interests, achieved by channeling such disputes into the federal courts. This purpose requires that the statute be construed to reach all entities in which a foreign sovereign has a genuine majority ownership interest, however that interest may be structured. A formalistic approach that would automatically exclude from FSIA protection any entity that is owned by a foreign sovereign through a tiered structure is destructive of that core purpose. The district courts should determine whether an entity qualifies for FSIA protection based on the substance of the foreign sovereign's ownership interest and not by application of a rigid rule against tiering.

ARGUMENT

Beginning with *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), the Ninth Circuit has refused to accord FSIA status to tiered entities. In the case at bar (*Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), *cert. granted*, 70 U.S.L.W. 3798 (2002)), the Ninth Circuit ruled that the manner in which the Israeli government structured its ownership interests in the Dead Sea companies disqualifies them from treatment as state-owned instrumentalities under

the FSIA. In *EOTT Energy*, the Ninth Circuit reached the same conclusion regarding the Republic of Ireland's ownership of Icarom. In each instance, the circuit court's ruling cannot be squared with the plain language of the statute and, moreover, is at war with the statute's underlying purpose. This Court should reverse.

I. ICAROM IS A COMPELLING EXAMPLE OF AN INSTRUMENTALITY THAT IS 100% OWNED BY A FOREIGN GOVERNMENT NOTWITHSTANDING THE FACT THAT LEGAL TITLE TO ICAROM'S SHARES IS HELD BY NOMINEES.

There are a huge variety of circumstances in which foreign governments choose to tier their ownership of entities in which they have a genuine, even vital, proprietary interest. As one commentator has noted, the Mexican government has long had a vital national interest in its oil industry, its major source of foreign exchange. That interest did not diminish when, in 1982, Mexico decided to restructure its ownership of what had been a single national petroleum company into a holding company with four subsidiaries.[3] This Court should therefore be careful in construing the FSIA to take into account not only the fact pattern presented in *Patrickson* but the wide array of ways in which foreign governments may structure their ownership interests. The Irish government's ownership of Icarom provides a useful fact pattern against which the statute can be measured. As we shall show, the Republic of Ireland, as beneficial owner of Icarom, indisputably holds 100% of the proprietary interest in that company notwithstanding that in structuring its ownership it

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[3] Joseph W. Dellapenna, *25th Anniversary of the Foreign Sovereign Immunities Act: Refining the Foreign Sovereign Immunities Act*, 9 Willamette J. Int'l Law & Dispute Resolution 57, 89 (2001).

chose to use a shell corporation whose only function is to act as its nominee in holding bare legal title to Icarom's stock.

Icarom is thus not some remote entity in which the Irish government happens to have a commercial interest. The government did not acquire ICI in order to generate commercial profits from the business of insurance. Rather, the government acted to salvage ICI when it became insolvent. It did so for the stated purpose of protecting the Irish economy from the risk of collapse that the government feared could ensue from the financial failure of one of the country's largest insurers and the threat this posed to its parent, the country's premier commercial bank. The structure of that acquisition, in turn, was dictated by requirements of Irish law in combination with the government's perception that speed and initial secrecy were essential to the acquisition.[4]

A. ICI's Background and Later Insolvency

ICI was incorporated as a limited liability company in 1935, in Dublin, Ireland. In its early years, ICI primarily concentrated on Irish non-life insurance business. The company rapidly grew to become the largest liability and marine insurer in Ireland. In the 1970's, ICI expanded its operations into foreign markets, including the London insurance market.

In 1981, AIB acquired 25% of ICI's stock. Two years later, AIB purchased the remaining ICI shares and assumed full control of the company. Shortly after the acquisition,

[4] Facts pertinent to the Republic of Ireland's ownership of Icarom are drawn from the record in *Fortis Insurance* and *USX Corp. v. Adriatic Insurance Co.*, No. 95-866 (W.D. Pa. removed June 7, 1995), and in particular from the Republic of Ireland's Certification of Ownership, discussed more fully at pp. 9-10 *supra*. A copy of the Certification of Ownership is included among the material lodged with the Court by these *amici*.

however, AIB discovered that ICI's financial position had deteriorated, due in large part to losses associated with its London business. In late 1984, AIB injected IR£40 million of capital into ICI to shore up its operations. However, this investment proved insufficient to rehabilitate ICI. Upon further investigation, AIB determined that there were additional deficiencies that made ICI's continued viability questionable and learned that ICI could not estimate with any degree of certainty the extent of its losses. It eventually became painfully clear that the restoration of ICI to full health would require major additional funding.

B. The Irish Government's Response to the Impending Economic Crisis

In early 1985, AIB informed the Irish government of ICI's precarious financial condition. Given the enormity of ICI's losses and the amount of money likely to be needed to put the company on sound financial footing, the Irish government quickly recognized that AIB was incapable of funding ICI's liabilities without putting its own solvency in jeopardy. Since AIB was the largest bank in Ireland and ICI was the leading insurer to corporate Ireland, the Irish government had grave concerns about what might happen to the Irish insurance and banking systems and, in turn, to the Irish economy if information concerning ICI's financial condition became public with no solution to the impending crisis in place.

"To avoid [ICI's] collapse and to minimise as far as possible the general economic repercussions that might arise therefrom," the Irish government reached the decision on March 15, 1985, to take emergency action.[5] Its solution was to acquire ICI from AIB, relieve AIB of the exposure that ICI represented to its own financial condition, and have the public

[5] Republic of Ireland Certification of Ownership, Lodging Material at 20.

treasury serve as the source of funds of last resort in the rehabilitation of ICI. Since the goal of the acquisition was to maintain the stability of the insurance and banking systems in Ireland, the government wanted it to be immediately clear to the public that AIB no longer had responsibility for the liabilities of ICI and that the government, not AIB, would assure that ICI would not default on its insurance obligations. Thus, the government acted to complete its acquisition of ICI by the end of the St. Patrick's Day weekend when the financial markets would reopen.

To effectuate the transfer in the quickest and quietest manner possible, the government used a "shelf" company, Gebhard Limited, controlled by the Minister for Industry, Trade, Commerce and Tourism ("Minister"), through which to acquire the shares of ICI from AIB. Subsequently, the Irish Parliament enacted legislation that specifically authorized the Minister to acquire ownership of ICI through Sealuchais Arachais Teoranta ("SAT"), the new name for Gebhard Limited. This legislation, entitled the "Insurance (Miscellaneous Provisions) Act 1985" (the "1985 Act"), made the transfer of ICI's shares to SAT retroactive to March 15, 1985.

C. The Structure of the Government's Ownership of ICI

The threatened economic crisis that led the Irish government to acquire ICI also influenced the ownership structure that the government elected to use for the acquisition. Initially, the government acquired ICI through Gebhard Limited, a pre-existing shell company controlled by solicitors acting for the Irish government. After securing control, the government could act more deliberately in the passage of special legislation authorizin , this shell, renamed SAT, to serve as the holding compar nominee for the Minister.

Under Irish law, ICI was required to have at least seven shareholders in order to maintain its status as a public limited company ("plc"). Accordingly, the government caused legal title to six of ICI's shares to be issued to senior civil servants, who hold them in trust for the Minister. SAT took legal title to the remaining 139,999,994 shares of ICI as a holding company nominee for the benefit of the Minister. Under Irish company law, a company that is not a plc must have at least two shareholders. Two high-ranking civil servants therefore agreed to hold legal title to the only two issued shares of SAT in trust for the Minister. The terms of the trusteeship under which the two civil servants hold the shares of SAT are set forth in the 1985 Act, which also establishes that control over the trustees rest with the Minister. For example, the shareholders of SAT, who are also its directors, are appointed by and may be removed by the Minister, after consultation with the Minister for Finance. The directors of SAT hold their positions on terms and conditions set by the Minister in consultation with the Minister for Finance. In the event of the death or retirement of a director, his share automatically vests in the Minister without the necessity for transfer. Any dividend received on account of the shares of SAT must be paid to the Minister for the benefit of the Exchequer.

The Republic of Ireland has officially confirmed its ownership of Icarom when the issue has arisen in jurisdictional disputes. In an insurance coverage action pending in district court for the western district of Pennsylvania[6], the current Minister for Enterprise, Trade and Employment[7], the Honorable Mary Harney, provided a Certification of Ownership, duly authenticated by the U.S.

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[6] *USX Corp. v. Adriatic Ins. Co.*, No. 95-866 (W.D. Pa. removed June 7, 1995).

[7] The name of the Department of Industry, Trade, Commerce and Tourism was changed in 1992 to the Department of Enterprise, Trade and Employment.

Vice Consul in Ireland, formally declaring the government's assertion of ownership of ICI and now Icarom. Icarom subsequently filed the same Certification in the southern district of Texas, and it was the basis for that court's recent decision in *Fortis Insurance* recognizing Icarom's status as an instrumentality of the Irish government. As stated in the Certification, the responsible government Minister "continue[s] in full ownership of ICAROM plc, in a manner consistent with the Irish Law." [8]

Under this ownership structure, all the shares of Icarom are held for the benefit of the Minister and she, as the personification of the Irish state, is the beneficial and equitable owner of 100% of Icarom. Given its 100% beneficial interest, the Irish government's ownership is not indirect in any sense pertinent to the statutory scheme. The holding company and civil servants are not true intermediaries even in the sense of an operating company that owns subsidiaries but are instead merely nominees whose sole function is to hold legal title to ICI's stock for the government's benefit. Only by exalting form over substance could ICI be deemed an inappropriate entity for "instrumentality" treatment under the FSIA.[9]

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[8] As the circuit court observed in *S & S Machinery Co. v. Masinexportimport*, 706 F.2d 411, 415 (2d Cir. 1983), "statements of foreign officials . . . have been accorded great weight in determining whether an entity is entitled to claim the protection of the FSIA." *See Fortis Ins. Ltd. v. Browning-Ferris Indus., Inc.*, No. H-02-1226, slip op. at 6 n.8 (S.D. Tex. June 26, 2002); *Outboard Maritime Corp. v. P.T. Indonesian Consortium of Constr. Indus.*, 582 F. Supp. 1136, 1143-44 (D. Md. 1984).

[9] In *USX*, in addition to challenging the analysis of tiered ownership championed by *Gates* and its progeny, Icarom contends that: (i) by virtue of the Irish government's 100% beneficial interest, it is directly owned by the government and not indirectly owned through a true intermediary; and (ii) because the government acquired it in order to rescue the Irish economy, it qualifies in any event as an organ of the government. Plainly,

II. THE STATUTE'S PLAIN LANGUAGE SUPPORTS EXTENDING FSIA PROTECTION TO MAJORITY-OWNED ENTITIES, WHETHER HELD DIRECTLY OR INDIRECTLY.

In *EOTT Energy*, the Ninth Circuit adhered to the inflexible rule against tiered ownership that it had laid down in *Gates* and followed in *Patrickson*, holding that Icarom is not majority-owned by the Republic of Ireland. Contrary to the Ninth Circuit's thesis, the FSIA's majority-ownership requirement does not purport to direct exactly how a state instrumentality must be owned. The requirement is a functional and practical measure of the extent of a foreign government's proprietary interest in an entity. It is not a rigid blueprint that dictates to foreign governments how to legally structure their sovereign affairs. It expressly does not specify the type of ownership interest that must be held. It does not limit ownership to holding legal title to the instrumentality's stock. It does not prohibit ownership through intermediaries. Rather, the statute simply requires that the foreign state own a "majority" interest in the entity, whether that interest is held through "shares" or through some "other ownership interest." 28 U.S.C. § 1603(b)(2). As the Fifth Circuit correctly observed in *Linton v. Airbus Industrie*, 30 F.3d 592, 598 n.29 (5th Cir. 1994), the FSIA "erects no explicit bar to the methods by which a foreign state may own an instrumentality."

One of the more perplexing aspects of the Ninth Circuit's analysis is its assertion that a prohibition against any tiered ownership is required by the literal language of the statute and its insistence that Congress should have used other language if it meant to allow indirectly-owned entities to

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a purely commercial entity can be government-owned without being an organ, and an entity can perform functions that qualify it as an organ without it being government-owned. Icarom is both.

qualify as agencies or instrumentalities. In fact, the plain language of §1603 dictates that an agency or instrumentality of a foreign sovereign may be owned by another agency or instrumentality of that sovereign, and Congress did not need to use other language to achieve this result.

First, and foremost, the words "foreign state" constitute a defined term in the statute. No interpretation is required to so conclude. The term is bracketed by quotation marks and is expressly listed as such under the provision entitled "§1603(a). Definitions." That section unambiguously provides that "for purposes of this chapter," the defined term "foreign state" shall be deemed to "include" both a "political subdivision" and an "agency or instrumentality" of that state. 28 U.S.C. § 1603(a). The sole exception, again expressly, is §1608, a provision dealing with service of process and other procedural matters not pertinent to the issue here presented. There and there alone, the statute says that the term "foreign state" when used in combination with the term "political subdivision" is meant to exclude any "agency or instrumentality." In all other instances, the more inclusive statutory definition of "foreign state" contained in §1603(a) applies. Hence, when the defined term "foreign state" appears in the very next subsection, §1603(b)(2), it must be read expressly to "include" an "agency or instrumentality." An "agency or instrumentality" is therefore defined as "any entity . . . a majority of whose shares or other ownership interest is owned by a foreign state," which, in turn, "includes" its "agencies and instrumentalities." 28 U.S.C. § 1603(b)(2). Thus the statute's plain reading is that direct ownership by the foreign government itself is not required. FSIA status extends as well to those agencies and instrumentalities majority-owned by other agencies or instrumentalities of the foreign government.

Second, the statute nowhere expresses the notion that indirect ownership does not qualify for FSIA treatment.

There are no such words in the statute. To the contrary, the only express requirement is that the foreign state must hold the majority ownership interest in the entity, without distinction as to whether it be direct or indirect. To be sure, there are statutes that for clarification or emphasis add the phrase "directly or indirectly" to indicate the breadth of a term or concept, but that phrase is hardly mandatory in order for courts to give a statute an equivalently broad construction. The Ninth Circuit improperly takes the statute's silence as a directive to engraft the opposite phrase—"directly but not indirectly"—on the statutory language. But the statute itself uses no such phrase.

In the face of the statutory language that says that the term "foreign state" is one of the statutory "definitions," the Ninth Circuit's insistence that it is not is indefensible. In the face of the statutory command that the term shall be used as defined for all purposes in the FSIA, except for the one express purpose of service of process, the Ninth Circuit's decision to broaden the exception to other circumstances, unexpressed in the statute, is untenable. In support of its rewriting of the statute, the Ninth Circuit makes two points, neither of which withstands analysis.

First, the court stresses that Congress used the word "includes" when it incorporated a political subdivision and an agency or instrumentality into the term "foreign state" rather than use the word "means." *Gates*, 54 F.3d at 1462. But this choice of words hardly transforms what Congress explicitly called a "definition" into a non-definition. Use of the word "means" would have been appropriate had Congress endeavored to supply a complete list of all entities that fall within its defined term, but Congress did not choose to do it that way. For starters, the inclusion of the foreign sovereign itself and the sovereign's central government are both left implicit. The use of the word "includes" makes clear that, regardless of whatever else the term might encompass,

"foreign state" expressly extends to a foreign sovereign's agencies and instrumentalities.

Congress' use of "includes" to set forth a definition is common in many statutes. It is even used elsewhere in the FSIA. In 28 U.S.C. § 1603(c), in defining the "United States" for purposes of the statute, Congress specified that the term "includes all territory and waters, continental or insular, subject to the jurisdiction of the United States." Surely this choice of "includes" rather than "means" would not leave a court free to limit the phrase in other sections of the statute to territorial land and not territorial waters. If anything, the word "includes" is more expansive than the word "means" when used in a definition, since it leaves the courts room to enlarge upon the enumerated list with other similar instances. However, it does not permit a court to exclude expressly listed instances, as the court below has done.

Second, the sole reason the Ninth Circuit gives for its gloss on the statutory definition—its perceived need to avoid surplusage—also does not hold up to close inspection. *Gates* argues that if the term "foreign state" in all instances includes an "agency or instrumentality," it must perforce also include a "political subdivision," making the express addition of "political subdivision" in §1603(b)(2) unnecessary. 54 F.3d at 1462. The flaw in the *Gates* analysis is its transformation of a tool of statutory construction into a rule of law. To be sure, it is usually appropriate to construe statutes so as to avoid redundancies. But as this Court has emphasized, canons of construction are no more than rules of thumb which sometimes must yield to the cardinal canon of construction, that the Congress is presumed to say what it means and mean what it says. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("[r]edundancies across statutes are not unusual events in drafting"). The Ninth Circuit ignored this principle in *Gates* which in other settings it, too, has recognized. *See, e.g., Cool Fuel, Inc. v. Board of*

Equalization, 210 F.3d 999, 1005 (9th Cir. 2000) ("rigid adherence" to rule against redundancy "must yield" when it would "require disregard of clear indications to the contrary" (quoting *United States v. Zacks*, 375 U.S. 59, 69 (1963))).

Here, application of the rule would be contrary to the unambiguous statutory command that for all purposes save one, the term "foreign state" shall include its "agency or instrumentality." The *Gates* reading would erect a second exception, flatly contrary to what the statute says. As the Seventh Circuit recognized, in deciding whether to accept an arguable redundancy or to impose a construction that clearly conflicts with a clear statutory command, the redundancy must be tolerated. *In re Air Crash Disaster Near Roselawn*, 96 F.3d 932, 940-41 (7th Cir. 1996); *see also, Parex Bank v. Russian Sav. Bank*, 81 F. Supp. 2d 506, 508 (S.D.N.Y. 2000). It is not for the courts to tidy up poor statutory drafting at the cost of Congressional intent.

The Ninth Circuit unfortunately ignores other important statutory language bearing on the issue. In establishing its ownership-interest test, Congress recognized that a foreign government's interest, whether in a corporate or non-corporate entity, could be held through "shares" or some "other ownership interest." It is telling that Congress used the words "owned" and "ownership" in the statute without defining them. *See* 28 U.S.C. §1603(b)(2). Just as this absence of definition of these words permits a broader, more flexible construction, the disjunctive phrase that joins a particular instance ("shares") with the general category ("other ownership interest") is expansive, not limiting. *See id.* Plainly, the form of "ownership," whether the entity is "corporate" or non-corporate ("otherwise"), is not restricted to "shares." [10] Given the vast array of forms of ownership

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[10] Contrary to the Ninth Circuit's suggestion in *Patrickson*, 251 F.3d at 807, the term "other ownership interest" is not tied solely to non-corporate ("otherwise") entities like partnerships. Just as the statute refers to non-

that the hundreds of different foreign governments with widely disparate legal systems could potentially use, declining to provide a fixed statutory definition of these words is not surprising, and the Ninth Circuit was wrong in insisting upon a limited definition.

In sum, on plain reading, the statute does not distinguish between legal and beneficial ownership, nor between ownership of a corporate entity through shares or through other ownership interests, nor between direct and indirect ownership. By definition, it expressly permits an agency or instrumentality to be owned by another agency or instrumentality. The Ninth Circuit's conclusion to the contrary, based solely on a concern about surplusage, cannot be sustained.

III. THE STATUTE'S UNDERLYING PURPOSE WOULD BE DISSERVED BY REQUIRING A BRIGHT-LINE DISTINCTION BETWEEN DIRECT AND INDIRECT OWNERSHIP.

We do not wish to be understood to discard the Ninth Circuit's concerns regarding plain language. There is a genuine issue of surplusage, and to that extent the statute could be clearer. Rather, we fault the Ninth Circuit for insisting that it has found the correct plain reading of the statute when its reading fails even more than its alternative to account for the full statutory text. To the extent that ambiguities persist after a plain reading of a statute, and the various rules designed to aid construction are inconclusive or in conflict, the touchstone for interpretation must be the nature of the statute itself. No statute should be read in a vacuum. Its underlying object or fundamental purpose must

corporate ("otherwise") entities held by "shares" (*e.g.*, partnership shares or shares in a joint stock association), so, too, does it expressly contemplate that a "corporate" entity can be held by an "other ownership interest." 28 U.S.C. § 1603(b).

inform its construction. Yet it is here especially that the Ninth Circuit's analysis stumbles. More troubling than the flaw in their linguistic analysis is the damage that *Gates* and its progeny would inflict on the FSIA's core purpose: to protect the foreign relations interests of the United States by minimizing the chance for confrontations with foreign governments that might arise by exposing them to the potential vicissitudes of state court justice and jury verdicts. It is not comity but uniformity of treatment which the FSIA seeks to promote.[11] Under the FSIA's approach, the key to promotion of good foreign relations in respect to litigated controversies is in assuring uniformity of treatment from nation to nation by placing their matters in the hands of the federal judiciary. Recognizing the many ways in which foreign governmental interests may be involved in a litigation controversy, Congress chose to describe broadly what constitutes a "foreign state" for purposes of the statute. Congress thus intended the FSIA to extend procedural protection to a wide array of entities in which a foreign government has a majority proprietary interest, and the

[11] Unfortunately, the Solicitor General's brief in support of certiorari misses this point. Noting that foreign jurisdictions generally do not grant immunity-based protections to government-owned entities at all unless they engage in sovereign acts, the Solicitor General suggests that extending such protection to subsidiaries would be even less reciprocated abroad. Brief at 11. Yet this very observation – that foreign jurisdictions do not typically grant protection even to directly government-owned commercial entities—underscores that the FSIA is not so much about comity as about uniformity. However foreign courts choose to treat U.S. government-owned commercial entities, Congress has determined to provide foreign government-owned counterparts not with immunity but with the uniform treatment that access to federal courts provides.

courts are accordingly obliged to construe the law broadly to achieve this end. As the legislative history of the statute shows:

> [E]ntities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

H.R. Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614.

A broad construction of such statutory terms as "foreign state," "agency or instrumentality," "ownership interest," and "owned," is particularly essential given the enormous diversity of foreign governments and systems of laws which the statute can be expected to reach. It would be the very antithesis of what the law seeks to achieve to adopt a narrow and parochial view of how the FSIA permits a foreign government to structure the entities in which it has a vital interest and still be eligible for FSIA treatment. Indeed, allowing the ownership structure required by the legal system of one foreign state to qualify while denying another's simply because, as with ICI, legal title is held by a nominee, would be calculated to accomplish the exact opposite of the statute's stated goal of uniformity of treatment and reliable access by foreign sovereigns to a unitary system of federal courts. As the legislative history observes, "broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." *Id.* at 6611.

It is in this context and not against the backdrop of what a court might regard as black-letter principles of U.S. corporate law that the FSIA must be interpreted. The notion that it is U.S. domestic jurisprudence on corporate organization and ownership that must inform how the FSIA is interpreted is hardly self-evident. The FSIA was not enacted to establish or even necessarily to reflect positive principles of corporate law, such as rules of limited liability, separateness of the corporate entity from its shareholders, consolidation of financials of related corporate entities, or the like. U.S. corporate law is thus not the appropriate model against which to measure the reach of the FSIA's majority ownership test.

ICI is a perfect illustration. As a matter of Irish law, the government could not be the sole legal owner of ICI with direct title to all of its shares, because a minimum of seven shareholders was required to maintain ICI's status as a public limited company. To be sure, as a strict legal matter, the Minister could have held legal title to all but six of ICI's shares, as the government typically does when it owns and operates commercial ventures, but the government never intended its ownership of ICI to represent a commercial venture opportunity. Because of the extraordinary economic circumstances that led to the ICI acquisition, other important Irish public policy considerations counseled a different structural approach. It was the prospect of an economic crisis arising from ICI's and, potentially, AIB's insolvency that caused the government to move quickly and quietly to secure control over ICI while the Irish financial markets were closed and, in turn, that led to use of a pre-existing shell corporation to acquire most of ICI's shares, which action was later retroactively authorized by the passage of the 1985 Act. This is the essence of sovereign discretion. For a court to hold that this ownership structure, dictated by Irish law and the perceived need for speed and secrecy, cannot qualify for the protection of the FSIA, notwithstanding that the government holds a complete beneficial interest, while another foreign

state's direct legal ownership of a mere 51% interest in a commercial operation would enjoy all the law's procedural benefits, is indefensible.

Seemingly oblivious to what the FSIA attempts to accomplish, *Gates* and its progeny assert that according foreign state status to indirectly majority-owned commercial entities would considerably expand the FSIA's protection "far down the line" of a corporate chain. *See, e.g, Gates*, 54 F.3d at 1462. Yet the Ninth Circuit recites no examples of circumstances in which second or lower-tier companies might be afforded FSIA protection when to do so would somehow be inappropriate. Indeed, it even acknowledges that "such a broad view of sovereign immunity may very well be desirable." *Id.* The short answer is that in determining whether an entity is too remote from the foreign sovereign, Congress did not set a direct-versus-indirect test but a majority-owned test. The mere fact that a foreign government decides to hold legal title to all of a company's shares though one or more intermediaries rather than directly does not lessen the government's true interest.

Similarly, the *Gates* observation that according foreign state status to commercial entities that are indirectly majority-owned by a foreign state unduly accords them competitive advantages just begs the question. Congress expressly chose to provide certain procedural protections to entities that qualify as foreign states, such as access to federal court, 28 U.S.C. § 1441(d), the determination of factual issues by federal judges rather than juries, *id.* at §1330(a), and the right to special protections from pre-judgment attachment and execution, *id.* at §§1609-11. The fact that those protections will be extended to indirectly-held entities does not in any way address the separate inquiry whether such entities are among those that Congress wished to favor.

For these reasons, the ABA Working Group tasked with the study of the FSIA recommended making the plain

language of the statute even plainer, by providing that the FSIA "does not require direct majority ownership by a foreign state for an instrumentality to qualify for" foreign state status.[12] As the ABA Working Group recommended (*id.*):

> [P]resumptive sovereign immunity should apply to corporations indirectly majority owned by foreign states [because] at least some states structure important areas of national interest, such as natural resources, through several levels of corporations. The strength of a foreign state's sovereign interests in an area do not necessary dissipate when employing more complicated legal structures resembling those used by modern private businesses.

This observation could have been written with ICI in mind, where any contention that the Irish government's ownership interest in ICI is somehow attenuated due to the fact that a nominee company holds legal title to most of ICI's shares entirely puts form ahead of substance. All of ICI's shares are ultimately held for the benefit of the pertinent Irish Minister. Quite simply, the Irish government owns ICI. This Court should reject any construction of the FSIA that would conclude otherwise.

IV. A Substantive Rather Than a Formalistic Approach Offers a Better Solution to the Issue of Tiered Ownership Under the FSIA.

Especially in circumstances where plain-text arguments raise honest differences, rigid adherence to a formalistic construction of a statute is ill-advised and scrupulous regard for the statute's underlying purpose becomes paramount.

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[12] *Recommendations and Report on the U.S. Foreign Sovereign Immunities Act*, Working Group of the Int'l Litig. Comm. of the Am. Bar. Ass'n, at 7 (October 2001).

Here, the Ninth Circuit has proffered no plausible policy argument why an entity should be excluded from the procedural protections of the FSIA solely because the foreign government has structured its ownership through an intermediary. To the contrary, that court has itself acknowledged that the better rule might be to include entities so owned. *Gates*, 54 F.3d at 1462. The better approach, we submit, is to require district courts to evaluate the factors that support or refute whether the foreign government has a genuine "majority" "ownership interest," regardless of how structured, rather than apply an inflexible antitiering rule.

The district courts are fully capable of assessing whether the foreign government has a true proprietary interest in the particular entity or whether its connection to the entity is entirely incidental and without indicia of genuine ownership. It is, after all, ownership that Congress set as its test. The test is not legal structure, not governmental purpose,[13] not day-to-day participation in the entity's affairs, not even control, although majority ownership may represent the power to control. The district courts are fully capable of determining whether the foreign government holds an actual majority ownership interest. The courts could deny instrumentality treatment where, for instance, the government for reasons peculiar to its system of laws holds full legal title to the entity but the beneficial interest is entirely in private hands. It can give due consideration to any expressions by the government of how it perceives its ownership interests in the entity in circumstances where its own laws and local circumstances have dictated the adoption of an indirect legal structure. All such considerations are well within the purview of the district courts in determining in specific circumstances what actually

[13] There is a separate test that does look to the governmental purpose of the entity in question, the "organ" test of §1603(b)(2), but that test is not at issue in *Patrickson*.

constitutes "majority ownership." No mechanical rule is needed, particularly none based on parochial notions of U.S. corporate law.

We do not presume to speak for the parties in the instant case as to how such factors apply to the Dead Sea companies, although it is difficult to see how the mere use of a tiered structure can obscure the fact the Israeli government owned well in excess of the majority interest in these companies. We simply suggest that no mechanical rule should be adopted under the guise of statutory interpretation that looks to form rather than substance. As a consequence, we urge that the Court reject any invitation to construe the statute so as to exclude an entity like ICI from treatment as a government-owned instrumentality under the FSIA.

CONCLUSION

For the foregoing reasons, *amici curiae* the Republic of Ireland and Icarom, plc (Under Administration) urge that the decision below be reversed.

Respectfully submitted,

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